No. 47.

Brief of Fennell for

Filed Oct. 14, 1901.

Office Supreme Court U. S.
FILED
OCT 14 1901
JAMES H. McKENNEY,
Clerk.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1901.

ANNA R. KEAN ET AL.,
Plaintiffs in Error,

vs.

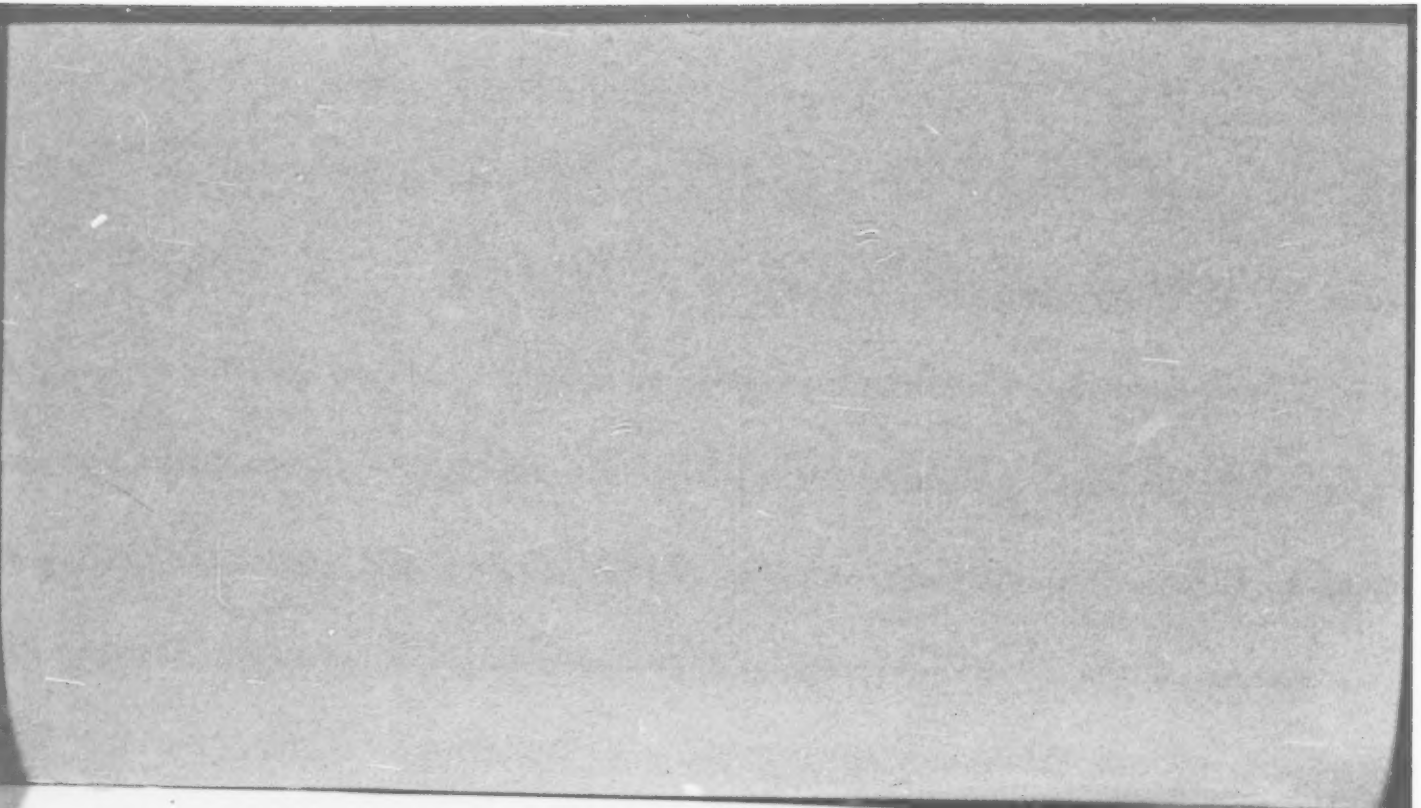
THE CALUMET CANAL & IMPROVEMENT COMPANY,
Defendant in Error.

Error to the Supreme Court of Indiana.

BRIEF FOR PLAINTIFFS IN ERROR.

WILLIAM P. FENNELL,
ATTORNEY FOR PLAINTIFFS IN ERROR.

BARNARD & MILLER PRINT.



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STATEMENT.

MAY IT PLEASE THE COURT:

The defendants below sued out this writ of error.

There have been two cases pending in this court, involving the title to portions of the bed of Wolf Lake in Indiana, *Kean v. Roby*, which involved all that part of the lake north of the center of Section 12, and *Kean* v. *Calumet Canal & Improvement Company*, which involves all of the bed of Wolf Lake south of the center of Section 12 and Lake George. The former case was dismissed under the rule owing to the inability of the plaintiff in error to pay the estimated cost of printing the record. The case of *Kean* v. *Roby* was argued orally in the Supreme Court of Indiana and an elaborate opinion was ren-

dered. This case, *Kean* [*or Mason*] v. *Calumet Canal & Improvement Company*, was not argued orally and the opinion was simply affirmed on authority of *Kean* v. *Roby*. Consequently it is in the opinion of *Kean* v. *Roby* hereto annexed that we must look for the errors upon which, we respectfully submit, this case should be reversed.

The defendant in error is the owner of the lots around the rim of the lakes, as shown by the original survey of 1834, and the plaintiffs in error are the owners of the lots in the bed of the lakes under patents issued under the Wolcott survey of 1876.

The facts are sufficiently stated in the opinion of the Supreme Court of Indiana in *Kean* v. *Roby*. The court will observe that Wolf Lake lies partly in Indiana and partly in Illinois, and is the same lake involved in a suit which has already been before this court in *Hardin* v. *Jordan*, 140 U. S., 371. The court will observe that the Supreme Court of Indiana bases its opinion exclusively on a certain construction of Sections 2395 and 2396, R. S. U. S. If its construction is right and applicable to the case the decision must stand; if wrong or not applicable it must be reversed. And this is purely a federal question. There are two leading cases in Indiana, *State* v. *Portsmouth Savings Bank*, 106 Ind., p. 459, which governs in cases relating to lakes or natural bodies of water around which meander lines were run, leaving the bed of the lake unsurveyed, which we contend is the fact in our case, and we rely exclusively on that case as being the law in Indiana and directly in point. The other case, also cited by the court in its opinion, is known as the Tolleston Club case, 141 Ind., 197, which relates not to lakes, but to a morass or marsh, and, as we hold, is not

the law of our case. The whole contention is as to which of those two cases governs in this case.

The issues are fairly joined and the facts almost undisputed.

It was admitted by the defendants below that the complainant below, defendant in error here, was the owner of the rim of the lakes as surveyed in 1834, and has been in possession thereof and had paid taxes thereon, and

It was admitted by the complainant below that the defendants had been asserting title to the beds of the lakes under the new survey since 1874, and had paid taxes thereon. (Rec., 97.)

"The Court: Is there any controversy but what the plaintiff and his grantors paid the taxes which were assessed against these lots which are numbered about the rim? And on the other hand, I suppose your people, some of them, paid taxes on the lake bed under this new survey.

Mr. Johnston: That is the fact about it.

Mr. Wood: I don't think there is any controversy about that.

Mr. Johnston: Then it is admitted that the plaintiff and its grantors under whom it claims title to those lots, paid the taxes from 1870 up to 1891, on all the lots which are numbered around the rim of the lakes, according to the descriptions that have been given.

Mr. Fennell: That will be admitted to the rim of the lake.

Court: They paid on the lots numbered about the rim of the lake.

Mr. Fennell: And the defendants paid the taxes on the lots numbered in the bed of the lake.

Court: Yes, claiming under the new survey, it being in reality a question as to the validity of the title to the property.

Mr. Johnston: Yes; that is right."

The defendant Kean also introduced certain tax deeds in evidence, which appear in the record at pages .

The defendant Mason had a tax title also, but no other interest in the case and has dropped out of it.

Wolf Lake is a natural lake, or pond, in the northern part of Lake County, Indiana, extending over into Illinois. It is about three miles long and one mile in width, running to a narrow neck at the northern part.

Over a greater part of its area the water is less than two feet deep, and over a large part of its area it is less than six inches. In some places the water is four or five feet deep, and in the neck of the lake, commonly called Wolf river, is was as much as fifteen feet deep. The condition of the lake is shown by actual survey and measurement in the map. All that is not dry land is to a large extent covered by vegetation—bull rushes, pond lilies, etc., and has been regularly assessed for taxes as land. The photographs in the record show that the waters have largely dried up and that houses have been built thereon. In one of these houses children of one of plaintiffs in error were born, one of whom is now about twenty-five years of age.

At the time of the original government survey of the township, made in 1834, a meander line was run around the margin of the lake, and upon the official plat the water indicated by the meander line was marked "lake," while the border land was divided into lots numbered 1, 2, 3, 4, 5, 6 and 7, Sec. 1, etc.

These border lots, as shown by the government plat, were selected by the State of Indiana under the Swamp Land Act of September 28, 1850, and a patent was issued by the United States to the State of Indiana. The plat was as much a part of the patent as if it had been incorporated therein.

The defendant claims to be the owner of those border lots by mesne conveyances from the State of Indiana, and by reason of such ownership of said border lots, they claim, and the court has so held, *that their title extends over the waters and bed of the lake.*

Lake George is just east of Wolf Lake, separated from it by a strip of land which was formerly a beaver dam and connected with it by an inlet running through this strip. Originally it was one body of water. About the time the case of *Kean* v. *Roby* was going through the courts, *Hardin* v. *Jordan* was being prosecuted in the United States Circuit Court to settle the title to the Illinois side of the lake. That case was originally decided by the late Judge Gresham against the pretentions of the so-called riparian owners. It was taken to the Supreme Court of the United States, and there it was held that that court was bound to follow the decisions of the State Court on a question involving a rule of property within the state, and "it seemed," so the court said, "that in *Illinois* the owner of the bank held to the center of the lake." Next in order came the decision of the Supreme Court of Indiana in *Kean* v. *Roby*, that the portion of the lake involved in that case was all surveyed land, although as a matter of fact the record showed that it was the deepest part of the lake, in one place seventeen feet deep at that time.

Then came a final decision by the Supreme Court of Illinois that Wolf Lake was *a public water course* not subject to private ownership, and that the rights of the public must be conserved therein.

It is hoped that this appeal will settle the plain truth that it is a natural pond in which the waters have largely dried up, that it was so in 1874, just as is now, and that it is identical with the Beaver Lake case in principle and fact. Water is now pumped into the lake to make ice.

See Record, page 83.

The question of possession is about the only question of fact about which there has been any controversy.

Defendant in error has introduced evidence for the purpose of showing that it has been in possession and so on. All such pretentions are in vain. They knew exactly the strength or the weakness of their claim to the bed of the lake, and hence cannot take any advantage of their possession of the lots around the rim. Their possession, such as it was, was no greater than that of plaintiffs in error. It is true that the defendant cut ice from the lake in the winter, and equally true that the plaintiff in error had leased it for hunting purposes, had a tenant in possession, so far as actual possession could be obtained.

In behalf of the plaintiffs in error (defendants below) it is contended that they had been in open and notorious adverse possession since 1874. The history of the settlement on these lands by the appellants is lucidly given in the testimony of Sarah Smale. (Rec., 107.)

Originally they settled there as homesteaders before the beds of the lakes were surveyed. It was upon their

application, supported by affidavits, that the survey was ordered, and right there this conflict began. Forsyth, the then owner of the rim of the lake, grantor of the defendant in error, contested the matter before the Interior Department at Washington, and the matter was delayed two years, after which time the survey was approved. Henry O. McDaid, Esq., acting as attorney for all the parties, persuaded them to abandon their homestead entries and allow the lands to be taken up with Sioux Half-Breed scrip, which was done. Patents were issued later to the various scrip-holders and conveyances made to each person according to his or her respective undivided interests. Houses were built on the land and a regular system of home-making was entered upon. See photographs (Rec.,). Children were born and reared in those houses, one of whom, the son of Mrs. Smale, is now about twenty-five years old.

All this is set forth in detail by Mrs. Smale. Charles Kreuter was put in possession of the entire premises as lessee, and is there now and will hold possession until the final decision of this case. (Rec., .)

In behalf of defendant in error, complainant below, it was contended that our possession was spasmodic and intermittent, and that the complainant had really been in possession of all that part of the premises which was capable of being reduced to actual possession.

This case differs from the case of *Kean* v. *Roby*, in the following essential particular:

1st. In this case we were defendants below. The complainant must recover, if at all, upon the strength of its own title.

BRIEF.

Under Section 2396, U. S. R. S., the original survey of 1834 did in fact and in law stop at the "water course." Boundary stakes were driven on the margin of the lake and were found by the men who made the Wolcott survey in 1876 of the bed of the lake.

The survey of the state line was made several years before the survey of 1834, therefore the west line of the sections were not run by the survey of 1834, as supposed by the court, and in fact the state line was not actually run through the lake at all.

A survey made by proper officers of the United States and confirmed by the land department cannot be shown to be inaccurate by collateral attack in the courts. * * * *Russell* v. *Maxwell Land Grant Co.*, 158 U. S., 253.

The fact that the survey under which the patents issued was contested at every step by the interested parties and was finally decided after six months' consideration by the Secretary of the Interior affirming the decision of the land office affords strong evidence of its correctness and honesty.

United States v. *San Jacinto Tin Co.*, 125 U. S., 273.

Wolf Lake must be taken as a whole, not in sections. It is a lake between two states.

The Supreme Court of Illinois has finally held that Wolf Lake is a public water course.

Hardin v. *Jordan, supra.*

This case is identical in law and in fact with *Hardin* v. *Jordan*, 140 U. S., 379, only the rule of property is different in Indiana from what this court assumed to be the law in Illinois. *State* v. *Portsmouth Savings Bank*, 106 Ind., page 459.

As to the entire sections being considered surveyed, in legal effect, because corners were established, the very same state of facts existed as to the sections of land involved in *Hardin* v. *Jordan*. A plat will be found in the report (140 U. S.) at page 373, from which it will be seen that all of the sections surrounding that portion of the lake had three corners established, except section 30, which had two corners established. The same thing might happen, and no doubt has happened, in surveys of land bordering on the ocean and on Lake Michigan. In fact it is a geometrical impossibility to draw a circular line on a sectional map without leaving from one to three established corners unless the line be serpentine. This court held in *Hardin* v. *Jordan* that the lake was meandered and that the official records (field notes) show that the line was run around the margin of the lake.

The defendant in error must recover on the strength of its own title, just as in *Hardin* v. *Jordan*.

Reference to a Plat.

"By reference, the plat of the section made by the trustees in 1846 became a part of the conveyance as much so as if it had been copied into the patent deed. *Piper* v. *Connelly*, 108 Ill., 646; *Louisville & Nashville Railroad Co.* v. *Koelle*, 104 *id.*, 455." "And the rule of law is that when lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat. *McCormick* v. *Huse*, 78, see 363—citing *McClintock* v. *Rogers*, 11 *id.*, 279."

Swamp Land Act of Sept. 28, 1850.

Upon the question of the construction of the act of September 28, 1850, commonly called the Swamp Land Act, I know of no better authority than the case of the *State* v. *Portsmouth Savings Bank,* reported in 106 Indiana, page 435. In that case, after an exhaustive review of the authorities, the court said:

> "The correct doctrine to be gathered from the foregoing cases, and especially from the decisions of the Supreme Court of the United States, *which are authoritative upon the construction of federal statutes,* seems to be the following:
>
> "First, the Swamp Land Act of 1850, *ex proprio vigore,* was a grant in *presenti* to the states of all the swamp lands therein situated."
>
> "*Second,* whether or not any particular tract of land was or is swamp land within the terms of the grant, was and is a question for the decision of the Secretary of the Interior."
>
> "Third, *his decision upon that question, when once made, is final and conclusive, and cannot be questioned or overthrown by parole evidence."*
>
> "Fourth, it is not necessary that the decision of the Secretary, that any particular tract of land was or is swamp land, should be evidenced by a patent to the state. It is sufficient that the land has been *selected* as such, and the *selection is approved by that officer."*
>
> "Fifth, when such selection has been approved by that officer, and the particular tracts of land thus identified as swamp land, the title relates to the date of the grant, namely, September 28, 1850."
>
> "Sixth, a patent to the state of swamp lands issued by the Secretary of the Interior is evidence that the designated tracts are properly selected as swamp land, and fixes the title thereto as of the date of the Swamp Land Act, September 28, 1850."
>
> "Seventh, if the Secretary of the Interior has not

designated any particular land, *and has not decided to the contrary,* and neglects and refuses to act for the premises as against wrongful claimants, it may be shown by parole in behalf of the state or those claiming under it, that the land is in fact swamp land."

"While it may be that the state, in the absence of some statute of its own to the contrary, might convey its right to and interest in any particular tract of land before it is segregated as swamp land, and said segregation approved by the Secretary of the Interior, the title of such grantee would be liable to be defeated by a decision by that officer that such land was not, or is not, swamp land, within the meaning of the Swamp Land Act of 1850."

If defendant in error has not the paramount title to the land in question it is a mere intruder without title.

But the success of appellant in this case does not depend upon a construction of the act of September 28, 1850. Whether or not that act operated as a grant *in presenti* to the various states of all the swamp land within their borders is not the question before this court, unless it finds also that the title passed to the appellees *as riparian owners,* because if appellees have no title to the water, they are *mere intruders,* and *as to them,* the patents issued under the new survey *are conclusive* "that the lands were of the character which by the patents they were represented to be." Such is the doctrine laid down in *Wright* v. *Roseberry,* 121 U. S., 488, commenting upon the case of *Eberhardt* v. *Hogaboom,* 115 U. S., 67, the court say:

"This was the case of *Eberhardt* v. *Hogaboom.* There the *plaintiff* claimed by a patent issued to his grantor under the pre-emption laws. The defendant admitted he was in possession of twenty acres,

and contended that they were swamp and overflowed lands which passed to the state under the act of 1850. It appeared, however, that the certificate of purchase which he produced *did not embrace the lands in controversy,* and his offer to prove the character of the land as swamp and overflowed *by parole was rejected.* The court said: 'He was as to the twenty acres a mere intruder without claim or color of title. *He was therefore in no position to call in question the validity of the patent of the United States for these acres, and require the plaintiff to vindicate the action of the officers of the land department in issuing it.*"

"And again:

'It is the duty of the land department, of which the secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws: *and his judgment as to this fact is not open to contestation in an action of law by a mere intruder without title.*' "

All presumptions are to be indulged in support of proceedings upon which a patent is issued and the patent is not open to collateral attack in an action of ejectment or a suit to quiet title. The title of the plaintiffs in error, being based upon a United States patent, is conclusive except as to one claiming under a paramount title. Therefore, whatever might be the conclusion of this court, if the state were a party to this suit, as between appellant and appellees, the patents issued under the new survey are the source of a valid title in plaintiff in error, unless the court reverses the rule laid down in the Portsmouth Savings Bank case and finds that the appellees take the bed of the lake as riparian owners.

In the case of *Eberhardt* v. *Hogaboom,* 115 U. S., p. 67, it was held that it is the duty of the Land Department,

of which the Secretary of the Interior is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and that his judgment as to this fact is not open to contestation in an action at law. What could be plainer than this statement, and it is as applicable to this case as it was to the case of *Eberhardt* v. *Hogaboom*. In that case the patent was issued under the pre-emption law; in this case under another act of Congress, authorizing the location of certain Indian scrip. The principle is the same in both cases.

The case of *The Iowa Railroad Land Company* v. *Antoine*, 52 Iowa, 429, is directly in point. Plaintiffs in that case claimed the title under a railroad grant, and introduced in evidence the certificate of purchase approved by the Secretary of the Interior. It was held that parol evidence was not admissible in behalf of the defendant, having no evidence of title to impeach the plaintiff's title by showing that the land was in fact swamp land, and hence passed under the prior Swamp Land Act. That case was cited with approbation and followed by the Indiana Supreme Court in the Portsmouth Savings Bank case.

Riparian rights have nothing to do with *the title to land under the water*. In *Diedrich* v. *The N. W. Ry. Co.*, 462 Wis., 262, the court said:

> "Riparian rights proper are held to rest upon title to the *bank* of the water, *and not upon title to the soil under the water.*"

It was evidently the intention of both the national and state governments to convey the border lands to the edge of the pond and according to the general rules of conveyancing if there is a discrepancy between the meander line

as indicated on the map and the actual water line, the natural monument which was intended by the parties to be the boundary, would be the boundary, and not the artificial meander line. Whether the meander line indicated the boundary line or not truly, is a question of fact. It may indicate the boundary line, and hence be a boundary line in fact, but having discovered where the boundary line was, supposing that the meander line correctly shows the water line, as it did in this case, then the boundary is fixed, and the subsequent recession, or drying up of the lake, would not extend the boundary line any more than the removal of a stone or a tree or any other natural monument which was fixed and agreed upon as a boundary.

There is no pretense, however, that the beds of Wolf Lake and George Lake have ever been selected as swamp land, and, on the other hand, it is not denied that the Secretary of the Interior has declared that the particular land in question was not swamp land within the meaning of the act of 1850 by issuing the patents under the Wolcott survey. So far as the decision of the Secretary of the Interior is concerned, this case has been before him upon appeal and patents having been issued, it is as to his department *res adjudicata.* If, as said by this court, his decision is final, and that question is settled for all time, therefore the court erred in permitting parol testimony over the objection of the defendant for the purpose of showing that the land in question was wet and overflowed land, and passed to the state under the act of 1850.

In 106 Ind., page 459, we find:

> "As we have before said, Bright and his grantees were bound to know that they had no title to the bed of the lake. The state has done nothing that would

justify a claim upon their part that they have been deceived or misled. Whatever they expended upon the bed of the lake, therefore, they must be held to have done it in the knowledge that the title to the land was in the state. They could not by thus improving the state's lands acquire title to them by estoppel." As to the title being in the state, it must be remembered that the court held that the act of January 11, 1873, operated as a selection or designation of the bed of Beaver Lake as swamp land. As the court held that the bed of Beaver Lake did not pass to the state by the act of January 11, 1873, it did hold that that act operated as a selection, and hence the title passed, as the Secretary of the Interior had not decided that it was not swamp land, or anything to the contrary, as in our case. The case was open for decision, but not so the Wolf Lake case, because the Secretary of the Interior had decided that it was not swamp land, and had allowed these patents to be issued upon appeal. Our case differs from the Beaver Lake case in that respect.

Again, upon the question of possession: The court says upon page 461:

"It was impossible for Bright to have had possession of the bed of the lake, unless he in some way had constructive possession, because during the time that he claimed to be the owner it was almost wholly covered with water. He had no grant from the state, nor had he anything else that gave him color or title. Whatever possession he may have had therefore was limited to the particular land over which he had exercised palpable acts of ownership."

Again, on page 463, the court reiterates:

"We have already seen that the grant of the border lands and the possession of them by Bright did not give him constructive possession of the bed of the lake. He is therefore not shown to have had any possession of the bed of the lake such as would put the statute of limitations in operation against the state."

Nothing could be clearer than that the Indiana Supreme Court has held in this case that the deeds of the border lands did not convey the bed of the lake to defendant in error.

And the court is not the less explicit upon the question of riparian rights. In the same case of Portsmouth Savings Bank the court says:

> "To grant the contention of appellee would be to hold that a grant from the state of a forty acre tract of overflowed and swamp land bordering upon a lake four miles in width, would take by the state's deed not only the forty acres, but in addition a strip of land as wide as the forty acre tract and two miles long. Without entering upon a review of the numerous cases upon the subject of riparian rights, we are very clear that the deeds or patents from the state to Dun and Condit carried to them no more of the swamp and overflowed lands than were included in the several surveyed subdivisions bounded by the lake."
>
> "As fully supporting our conclusions in this case, and upon the general subject of grants of lands bordering upon natural lakes, we cite the following authorities:
>
> *State of Indiana* v. *Milk,* 11 Federal Reporter, 389.
>
> *Boorman* v. *Sunnuchs,* 42 Wisconsin, 233.
>
> *State* v. *Gilmanton,* 9 New Hampshire, 461.
>
> *Seaman* v. *Bis,* 24 Illinois, 521.
>
> *Fletcher* v. *Phelps,* 28 Vermont, 257.
>
> *Mansur* v. *Blake,* 62 Maine, 38.
>
> *Wheeler* v. *Spinola,* 4 New York, 377.
>
> Angel Water Courses, Section 41.
>
> *Paine* v. *Wood,* 108 Mass., 160.
>
> *Diedrich* v. *North-Western U. R. W. Co.,* 42 Wisconsin, 248; American Reporter, 399."

The question of the approval of the Wolcott survey in 1874 of the bed of Wolf Lake was again before the Secretary of the Interior, the Hon. Carl Schurz, in the appeal of De Witt and Hardin. In deciding the appeal the Secretary said:

> "An application dated August 6, 1874, based upon affidavits, was made to your (Com. Gen. Land Office) office for a survey, under circular of July 1, 1874. Upon this application a survey was ordered, which was duly executed and approved by your predecessor December 31, 1874, a copy of the plat of which was soon after filed in the local office at Springfield."
>
> "Since the approval the tracts thus surveyed have been recognized and treated as public land, and claims have been initiated thereto in the usual manner, under general laws. * * * The tracts surveyed in 1834 and 1835 were disposed of long prior to the survey of 1874, *and owners of tracts that abutted upon the meander of the lake,* under the old survey, now claim the newly surveyed tracts as riparian owners. * * * To recognize riparian rights to these tracts would be equivalent to saying that the lands did not belong to the United States and that the survey is a nullity. * * * Your predecessor decided to order the survey upon consideration of the application therefor, and it was ordered *in pursuance of the regular practice of your office and of circular instructions for all surveys of that class of land.* The order of the survey, as well as the approval thereof, *involved a decision that the land belonged to the United States.*"

As to the Validity of the Patents.

The action of the Land Department in issuing a patent is conclusive in all courts and in all proceedings where by the rules of law the legal title must prevail. *Johnson* v. *Towsley,* 13 Wallace, 83.

In that case the court said:

> "That the action of the Land Office in issuing a patent for any public land subject to sale by pre-emption or otherwise is conclusive of the legal title, must be admitted under the principle above stated, and in all courts and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained."

See, also,

Warner v. *Van Brunt,* 19 Wallace, 653.
Shepley et al. v. *Cowan et al.,* 91 U. S., 340.
Moore v. *Robins,* 96 U. S., 530.
Marquiez v. *Frisbie,* 101 U. S., 473.

In *Vance* v. *Van Brunt,* 101 U. S., 519, the court decided that even where false testimony or forged documents had been used before the department it would not affect the binding force of the decision.

In *United States* v. *Schurz,* 102 U. S., 401, the court said:

> "To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws concerning the sale of the public domain." * * * "The question whether any particular tract belonging to the government was open to sale, pre-emption or homestead right is in every instance a question of law as applied to the facts for the determination of these officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character. It is clear that the right and duty of deciding all such questions belongs to these officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary."

In *Smelting Company* v. *Kemp*, 104 U. S., 646, Justice FIELD, speaking for the court, said:

> "A patent in a court of law is conclusive as to all matters properly determinable by the Land Department where its action is within the scope of its authority; that is, where it has jurisdiction under the law to convey the land. * * * Indeed, the doctrine as to the regularity *and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid it would be presumed that such circumstances existed.* * * * If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives a court of law can afford no remedy to a party alleging that he is thereby aggrieved."

In *State* v. *Smelting Company*, 106 U. S., 447, the court said:

> "Whether there are rights thus interfered with which should preclude the location of the mine and the issue of a patent to him or his successor in interest, is, when not subjected under the law of Congress to the local tribunals, a matter properly cognizable by the Land Department when application is made to it for a patent, *and the inquiry thus presented must necessarily involve a consideration of the character of the land to which title is sought,* whether it is mineral, for which a patent may issue, or agricultural, for which a patent should be withheld. * * * Necessarily, therefore, it must consider and pass upon the qualifications of the applicant the acts he has to perform to secure the title, *the nature of the land and whether it is of the class which is open for sale.* * * * *The validity of a patent of the government cannot be assailed collaterally because false and perjured testimony may have been used to secure it.* Any more than a judgment of a court of justice can be assailed collaterally on like ground." (P. 453.)

In *Quinn* v. *Conlon*, 104 U. S., 421, the court said:

> "The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superior in the department in such matters, *nor can they reverse or correct them in a collateral proceeding between private parties.*" * * * "The question whether the land in controversy had been freed from its reservation under the Mexican grant so as to be open to settlement and pre-emption depended upon matters disclosed by the record of proceedings in the Land Department, namely, *that the public surveys had been extended over the land,* and that other lands had been appropriated to the satisfaction of the grant."

In *Baldwin* v. *Stark*, 107 U. S., 465, Mr. Justice MILLER, declaring the opinion of the court, said:

> "It has been so repeatedly held in this court, in cases of this character, that the Land Department is a tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that department the decision is conclusive everywhere else as regards all questions of fact that it is useless to consider the point further."

In *Cornell* v. *Lammers*, 21st Fed. Rep., page 200, the court said:

> "These field books shall be returned to the Surveyor General, who shall thereupon cause a description of the whole land surveyed to be made out and transmitted to the officers who may superintend the sale." * * * *"The object doubtless is to enable the officers in charge to determine whether the lands are patentable or not."*
>
> "Thus the government has provided means to enable the land officers *to determine the character of the land,* and whether or not they are of the character granted by the acts or authorized to be sold or otherwise disposed of. * * * *The sooner it comes to be a generally recognized principle that a United States patent, regular upon its face and upon the*

record, issued in the form prescribed by law, means something; that is, is unassailable collaterally, or even with success directly, by parties having the proper status, except upon clear and indisputable evidence, the sooner confidence in land titles will be re-established."

"There is no authority to issue a patent which in effect only says if the land herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral [or swamp] lands, I do not grant them."

In *Wight* v. *Dubois,* Mr. Justice BREWER said:

"When the patent issues the title passes from the government, and no one can question that title who has not prior thereto himself acquired an interest in the land. It matters not what wrong the patentee may have perpetrated upon the government, it and it alone can complain. *In other words, when grantor and grantee are satisfied, a stranger has nothing to say."*

In *Cragin* v. *Powell,* 128 U. S., 593, Mr. Justice LAMAR said:

"That whilst lands are subject to the supervision of the General Land Office, the decision of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our Land Law, is settled by such a mass of decisions of this court that its mere statement is sufficient."

The case of *Gazzam* v. *Lessee of Elam Phillips et al.,* 20 Howard, page 374, is directly in point. In that case:

"The lessors of the plaintiff claimed title to the lot in dispute as heirs of James Etheridge, and gave in evidence a patent from the United States to their ancestors, dated 30th May, 1833, 'for the southwest

quarter section twenty-two, in township four south of range one, west, in the district of land subject to sale at St. Stevens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, *according to the official plat of the survey of the said lands,* returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said James Etheridge.'

"The defendant claimed under William D. Stone, and gave in evidence a patent to him from the United States, dated the 17th December, 1832, 'for the south subdivision of fractional section twenty-two, same township and range, containing one hundred and ten acres and fifty one-hundredths of an acre, *according to the official plat of survey of the said lands,* returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said William D. Stone. This fractional part was divided *according to the plat by a line* running north and south through it, *laying off in the west subdivision 92.67 acres and in the east 110.57 acres.*"

"Etheridge purchased the west and Stone the east subdivisions."

"The sales in each case were made in conformity with the subdivision, as marked upon the plat of the Surveyor General then on file in the office, and to which all purchasers of the public land had access, and which constituted the guide of the Register and Receiver in making the sales."

"The lessor of plaintiff also gave evidence showing that the premises in question were within the southwest quarter of section twenty-two, computing the same according to the usual measurements of quarter sections, and that a full quarter might have been laid off from the fraction, and claimed that the whole of the southwest quarter had been appropriated to their ancestor, Etheridge, under the Pre-emption Act of 1830, which position was assented to by the court."

"The court also ruled that the purchase and patent of Stone, under whom the defendant claims must be

restrained to the fraction in the west part of the south-east quarter of section twenty-two, and that it gave him no right to the land in the south-west quarter."

In reversing this case the Supreme Court of the United States says:

"The effect of this ruling, when applied to this case, gave the heirs of Etheridge one hundred and sixty acres of the fractional section *in disregard of the official survey, the purchase and patent for only the ninety-two acres,* and reduced the one hundred and ten which Stone purchased and had a patent for to some forty-three acres."

"The court is of opinion this ruling cannot be maintained, for, conceding for the sake of the argument that the plat by the Surveyor General of this section was made contrary to law, the ground upon which this decision is sought to be maintained, and that Etheridge, under the Pre-emption Act of 1820 was entitled to purchase the whole of the southwest quarter, and to have it surveyed and patented to him, *yet it was not so surveyed, nor did he purchase nor has he obtained a patent for the same.* On the contrary, he purchased and paid for the west subdivision only of this fractional section, containing ninety-two acres, and *took out a patent for the subdivision.* And in addition to this Stone at the same time purchased the east subdivision as *laid down on the official plat,* and has secured a patent for the same and which includes the premises in question. * * * We deny altogether the right of the court in this action to go beyond these terms, thus explicit and specific, and, under a supposed equity in favor of Etheridge, arising out of the Pre-emption Laws, to the whole of the southwest quarter, enlarge the description in the grant, more accurately speaking, determine the tract and quantity of the land granted by this supposed equity *instead of by the description in the patent.*"

LAND CANNOT PASS AS APPURTENANT TO LAND.

In *Child* v. *Starr,* 4 Hill, 396, it is held:

> "A conveyance of one acre of land can never be made by any legal construction to carry another acre by way of incident or appurtenance to the first."

Such is the doctrine laid down in 2 Mct., 147; 8 *id.,* 260; 10 Pet., 25; 15 John, 447.

LIMITATIONS.

If this were an action of ejectment it would be barred by the statute of limitation on account of our twenty years' adverse possession. "An action to recover possession of realty must be within twenty years *after the cause of action accrued.* It does not mean twenty years adverse possession." *Vandugan* v. *Hepner,* 45 Ind., 589.

The scrip was located March 5, 1874, and possession was taken before the lake beds were surveyed. (Rec., *et seq.*) See also testimony of Mrs. Smale. But this being a suit to quiet title it is barred by the fifteen years statute. *Caress* v. *Foster,* 62 Ind., 145; *Milner* v. *Hyland,* 77 Ind., 458. (The syllabus in this case is somewhat misleading. The decision is, in effect, that the statute does not begin to run *until the cause of action accrues.*)

This being a bill to quiet title, it is barred by the fifteen year statute of limitations. Since we have constantly been asserting an adverse title and disturbing complainant's alleged possession. Whatever cause of action it had at the time of the filing of this bill accrued certainly more than fifteen years before, and in fact more than twenty years before.

Appellees lay stress upon the case of *Forsythe* v. *John A. Smale*. As to that case I would say that John A. Smale never had any title to this land. The title was in his wife, Sarah Smale. (Rec., .) Mr. Smale died about the time the decision was rendered, leaving minor heirs, one of whom has just become of age, and that decision could have been re-opened by this heir if it were necessary. But the doctrine held in that case by the United States Circuit Court is not the rule in such cases and is in direct conflict with the case of *State* v. *Portsmouth Savings Bank*, 106 Ind.

This case should be reversed.

Respectfully submitted.

WM. P. FENNELL,
Solicitor for Anna R. Kean et al.

APPENDIX.

To show that unnavigable lakes and ponds have always had a legal status distinguished from swamp land and streams and navigable waters, I subjoin the following extracts from the brief of my learned predecessor, the late Henry O. McDaid, Esq., filed before the Secretary of Interior at the contest over the approval of the survey:

LAKES & PONDS.

HUBERUS.

"Caeterum in lacibus et stagnis jus alluvionis non agnoscitur ait Callistratus in L. 12. De A. R. D. addita ratione quia et si crescunt et decrescunt retinent tamen suos terminos; cum quod per aestatem sit aridum hyeme rursus inundit; ab hanc inconstantiam in iis nullam accessionis vel decessionis rationem habendum, monet Alfenus in Lib. 24. Tit. Ult. De. aq. et. aque pluv."

Huberus Book 2. Tit 1. P. 25, Page 104.

HUBER.

"Furthermore this right of alluvion is not recognized in respect to lakes and ponds (or standing waters). Says Callistratus in Law 12. De. A. R. D. the reason being added that although these lakes and ponds increase and decrease, they nevertheless retain their own proper boundaries since though during the summer they may be dry, in the winter they are again overflowed, and on ac-

count of this changefulness Alfenus says there is is no reason for accretion or decretion in respect to them. Lib. 24. (last paragraph) de aque & aque pluv."

1 Huber, Book 2. Tit 1. Paragraph 25. Page 104.

ROMAN LAW.

"Lacus et stagna, licet interum crescant interdum exarescant, suos tamen terminos retinent; ideoque in his jus alluvionis non agnoscitur."

Digest Lib. 41. Tit 1. De. aq A. R. D. Section 12 Callistratus Lib. 2. Institutes.

Lakes and standing waters, although they sometimes increase, and sometimes decrease, nevertheless, retain their boundaries; therefore to these the right of alluvion is not to be allowed.

Definition of lakes and ponds.

ULPIAN Says "Lacus est quod perpetuam habet aquam stagnum est quod temporalem contineat aquam ibidem stagnantum quæ quidem aque plerumque hieme cogitur."

Digest Lib. 43. Tit. 14. Sec. 4.

"A lake is that which holds perpetual water. A pond is that which holds temporary and stagnant water, the waters of which, are most commonly indeed, collected in the winter.

FRENCH LAW.

Section 1566. "La loi n'etablissant le droit d'alluvion qu'a l'egard des rivieres (Art 556 Code Civ.) qui n'ont jamais de fixite absolue dans leur lit, il faut entirer la consequens que les lacs, dont la position est au

contraire constante et invariable, doivent conserver toujours leur limites, sans que le droit d'alluvion puisse avoir lieu sur leurs bords durant les saisons ou il y a decroissement dans leurs eaux:

Lacus cum aut crescerent aut descrescerent, nunquam, neque accessionem neque decessionem in eos vicinis licut.

L. 24. P. 3. de aq et aq pluv. Liber 39. tit 3.

Traite Du Domaine Publique Francais.

Proudon & Dumay Tom IV. Section 1566.

Section 1566. "As the law only establishes the right of alluvion in regard to rivers which have no absolutely fixed bed, we must draw the conclusion that lakes whose position on the contrary, is constant and invariable, must always keep their limits without the possibility of the right of alluvion on their borders during the seasons when there is a decrease in their waters."

Treatise of Proudon & Dumay on the Public Domain of France. Book 4. Section 1566.

The following from Alfenus is cited in support of the doctrine:

"Either when lakes increase or when they decrease, it is never permitted to the adjoining owners to have accession or decession in regard to them.

Sec. 558. "Alluvion does not take place with regard to lakes and pools, the owner of which always retains the soil which the water covers when it is at the heieght of running over from the pool, even when the mass of water happens to diminish. And reciprocally the owner of the

pool acquires no right upon the adjoining lands which his water may chance to cover in extraordinary floodings."

Barrett's code Napoleon. Sec. 558.

GERMAN LAW.

Fredrician Code.

The Fredrician code in defining what classes of cases the right of alluvion pertains to, says (Section 35):

"The acquisition of property by alluvion does not take place then,

1. When a certain number of acres, called *morgen,* or *buffen,* are assigned to the possessor of the ground enlarged by an imperceptible accretion: for, in this case, all that exceed the number of acres granted to him has no owner, (*est res nullius,*) and consequently belongs to our royalties.

2. When the accretion happens in rivers which belong to private persons; because the estates of private persons in which those *running waters* are also included, are usually separated by fixed boundaries, and consequently common to both neighbors, etc.

3. When they are still waters, which, having no current, may indeed rise or fall, but make no alteration in the banks."

Fredrician code. Book 1. Art. 7. P. 45.

AER LIMITATUS.

(Limited Fields.)

Lands which are limited by boundaries particularly assigned by lines of measurement are not entitled to alluvion and a *fortiori* to reliction.

This was a rule of the common law.

Bracton, an eminent common law author of the time of Henry III., says:

"Habet etiam locum haec in agris non limito: nam in limitis non habet ~~loque~~ locum jus alluvionis. Sunt autem limitatis qui assignatur aliquibus certis locus & certes terminis ubi scitur quid cui sit datum quid retentu & relictu. Praeter agris limitatis non cedit insula ratione in flumina publico immo conceditur occupanti et per consequens regi propter sua priveliquie.

Bracton Ed., 14 1569. Book 2. Chap. 2. P. 2 fol. 9.

"However, this does not apply in regard to limited fields; for it is said the right of alluvion does not pertain to limited fields.

Limited fields are those which are granted out by certain limits and certain boundaries, whereby it is known what is granted, to each one, and what is to be retained, and what is to be relinquished.

Moreover, in the case of limited fields, an island in the bed of the public river, is not to be given to the adjacent owner, the king possessing it by reason of his prerogative."

Fleta, a work written, it is supposed, by some one of the judges who were imprisoned in the Fleet prison by Charles I., announces the same common law doctrine as to limited fields stated by Bracton, viz.:

"Sed haec quae dicta sunt, locum habent in agris non limitatis; nam in limitatis non habet locis & terminis, ut sciant quod, & cuit datum sit, & quid retentum, & quid relictum."

Fleta, Lib. 3. Chap. 2. Sections 8 & 9.

"But those things which have been said do not apply to limited fields; for the right of alluvion does not apply to limited fields. Limited fields are those which are assigned to any one by certain limits and boundaries, so that they may know what is granted to each one, what may be retained, and what relinquished.

Fleta, Book 3. Chap. 2. P. 8.

GROTIUS.

"Frequens est inter vicinos populos contentio, quoties fiumen cursum mutavit, an simul et imperii terminis muteter et an que flumen adjacit eis cedant quibus adjecta sunt; quae controversiae ex natura et modo acquisitionis definiendae sunt. Docent nos mensores tria esse agrorum genera: divisum et assignatum quem limitatum vocat Florentinus Juriconsultus quia manufactos limites pro finibus habet, assignatum per universitatum sive mensura comprehensum puta per centurias ac jugera et arcifinium qui inde dictus docente Varone quod fines habeat arcendis hostibus ideneor, id est naturales: ut sunt flumina et montes. Hos occupatorios dicit Aggenus Urbicus quia plerumque tales sunt agri qui aut eo quod vacui sunt aut etiam bello occupantur. In duobus primis agrorum generibus etiam si flumen cursum mutet nihil de territoria mutatur: et si quid alluvio adjacit id occupantium imperio accedit."

Grotius de jure belli et pac. Lib. 2. Chap. 3. Sec. 16.

"Frequently there is contention between neighboring people when a river changes its course, whether at the same time the boundary of the domain is changed, and whether what is added by the river is given to those who are adjacent, which controversies ought to be determined

by the nature and mode of acquisitions. We are taught by law writers that there are three classes of lands, viz.:

1. Divided or assigned, which are called limited by Juriconsult Florentius because they have what is set out by limits for their boundaries.

2. What is assigned as a whole or if comprehended by measure, that is to say by hundreds or acres.

3. And arcifinial fields which it is said was taught afterwards by Varus which possess boundaries sufficient to keep out enemies, that is natural, such as rivers and mountains.

Aggenus Urbicus calls these occupatiore because most commonly these are lands which are vacant or occupied by reason of war. In the two first classes of fields, even if a river changes its course, nothing concerning the boundaries is changed: So the alluvion which is annexed is added to the Government first occupying it."

Grotius, Lib. 2. Chap. 3. Sec. 16.

GROTIUS.

"Sed populus ut aliis, ita et proxima praedia possedentibus jus illud concedere potest et concessisse haud dubie viditur si agri illi non alium finem ea ex parte quam naturalum id est flumen ipsum habeant Quare non contemnenda est hac in parte Romanorum diligentia qui limitatum agrum ab aliis agris distinxerunt dummodo meminerimus agrum mensura comprehensum hac in re paris juris, esse cum limitato, nam quae de imperiis supra diximus cum de eorum occupatione agerimus eadem in agris privatis obtinent; sed hoc adhibito descrimimine quod imperia in re dubia credenda sunt esse arcifinia quia

id territorii naturae maxime convenit at agri privati magis est ut arcifinii non credentur sed aut limitati aut certa mensura terminati quia hoc privatum possessionem naturae est congruentius."

Grotius de jure belli et pac. Lib. 2. Chap. 8. Sec. 12.

"But as the people have the power to grant this right to others possessing the adjoining lands, it seems, without doubt, to have been granted if these fields have no other boundary on that side than the natural boundary, that is, they have the river itself. However, the learning of the Romans on this point ought not to be disregarded, who distinguish limited fields from other fields, and we have seen that on this point the same law applies to lands comprehended in an expressed measure, as applies to limited fields. What we have said concerning the boundary of states, when treating of their occupation, obtains the same in regard to private fields, but this difference should be observed that in case of doubt, states are to be considered as arcifinial (having natural boundaries) because that is especially in accordance with the nature of states, but private fields are considered not arcifinial, but are limited or bounded by certain measure, because this is more in accordance with the nature of private possessions."

HUBERUS.

"Quae presumtio cessat in agris limitatis certo descriptis vel mensura expressa comprehensis quibus ultra eorum limitis ni hil incremento. Videtur."

1 Huberus. 123. Sec. 33.

"The presumption of which (The right of alluvion) ceases in respect to fields described by a certain boundary, or comprehended in a certain measure, beyond that

boundary or measure it appears that nothing is granted by way of accretion."

Huberus 1. Vol. P. 104.

ROMAN CIVIL LAW.

"In agris limitatis jus alluvionis locum non habere constat; idque et Divus Pius constituit. Et Trebatius ait agrum qui hostibus devictis ea conditione concessus sit, ut in civitatem venerit, habere alluvionem neque esse limitatum; agrumantem manucaptum limitatum fuisse ut sciretur quid cui datum esset quid veni esset quid in publico relictum esset."

Dig. Lib. 41. Tit. 1. Sec. 16.

"It is certain (or apparent) that the right of alluvion does not take place in limited fields. Divus Pius has ordered it so; and Trebatius says that a field taken from an enemy and granted on the condition that it should be the property of the city has the alluvion and is not limited, but that the field, which since it was taken has been limited in order that it might be known what was given to any one, what was sold, and what remained to the public, has not the right of alluvion."

Dig. Lib. 41. Tit. 1. Sec. 16.

Hennecius also states the same rule of law, viz.:

"Ita nullum dubium quia id quod agris nostris hoc modo accedit nobis quod agro publico *viaeve* adjicitur publico cedere debeat."

Heinnecius Jus. Nat. & Gent. Lib. 1. Chap. 9. Sec. 25.

See also Heinnecius Elementa Juris. Lib. 2. Tit. 1. Sec. 358.

NATURAL RIGHTS.

"Quaedam naturali jure communia sunt omnium quaedam publica: naturali jure communia sunt omnium haec aer aqua profluens, et mare, et per hoc littore maris."

Grotius de jure belli et pac. Lib. 2. Chap. 3. Sec. 9.

Grotius cites the digest of Justinian in support of this doctrine.

"Certain natural rights are common to all, certain others are public; the natural rights common to all are air, running water, and the sea, and the shores of the sea."

Grotius on the rights of war, etc., Book 2. Chap. 3. Sec. 9.

Erskine in his institutes of Scotch law, states what are common or natural rights: those incapable of appropriation by one individual,—that cannot be brought under the power of any one, viz.: light, air, *running water,* the sea.

APPENDIX.

[Kean or] Mason *et al.*
vs.
Calumet Canal & Improvement Co.

(Supreme Court of Indiana. April 26, 1898.) 150 Ind., p. 50; N. E. R., p. 85.

Appeal from Circuit Court Porter County. John H. Gillett, Judge.

Action by the Calumet Canal & Improvement Company against Henry B. Mason and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. C. McMahan, W. P. Fennell and W. H. Latta for appellants. W. O. Johnson and Wm. Johnston for appellee.

HOWARD, C. J. This was an action brought by appellee against appellants and others to quiet title to certain real estate described in the complaint, and situated in S. ½ Section 18, and Section 19, Township 37 N., Range 9 W.; and in Sections 12, 13 and 24, Township 37 N., Range 10 W., in Lake County. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States under the swamp land act of 1850, and by the descriptions of the government survey of 1834. By the same descriptions the lands were conveyed by the state to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf Lake and the bed of Lake George, but

since the survey the waters have, in large measure, receded, leaving the lake beds comparatively dry land.

In 1875 certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey and the sales made in pursuance thereof, that appellants claim title.

The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v. *Roby*, 145 Ind., 221; 42 N. E., 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, was wholly invalid, and consequently that appellee's title as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.

The second contention is that the action is barred by the fifteen and twenty years' statute of limitation. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to title as we have seen there was none. As to possession, the court heard the evidence and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was on the part of appellants, or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds coming down from the original government survey, and had at all times such possession of and exercised such

dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court in *Worthley* v. *Burbanks,* 146 Ind., 534, 45 N. E., 779, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot, or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, or mining claim, a non-navigable lake, a prairie or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy. The appeal as to Henry B. Mason has been dismissed on his petition, and the contentions made in the brief filed in his behalf need not, therefore, be considered.

Judgment affirmed.

THE STATE OF INDIANA.

IN THE SUPREME COURT, NOVEMBER TERM, 1895.

On the 24th day of January, 1896, being the 53rd judicial day of said November term, 1895.

15903 HON. LEONARD J. HACKNEY,
Chief Justice.
HON. JAMES H. JORDAN,
Hon. LEANDER J. MONKS,
HON. JAMES MCCABE,
HON. TIMOTHY E. HOWARD,
Judges.

In the case of

Annie R. Kean
vs.
Edward Roby *et al.*

Appeal from the Lake Circuit Court.

Came the parties by their attorneys, and the court being sufficiently advised in the premises, gave the following opinion and judgment, pronounced by HOWARD, J.:

This was an action to quiet title to real estate, brought by the appellee Sophi A. Conklin against the appellant and other defendants made appellees on this appeal. Various answers and cross-complaints were filed by the appellant and by other defendants, and the cause was submitted to the court for trial, resulting in a finding and decree against plaintiff.

A new trial having been granted as of right under the statute, the cause was resubmitted to the court for trial

upon the pleadings in the first trial. There was a special finding of facts on this second trial, with conclusions of law, and a decree against the plaintiff and also against the appellant and others, and in favor of certain of the appellees; and the appellant, as also the plaintiff and others named, were enjoined from setting up or asserting any claims or title to the land in question.

Many alleged errors are assigned by the appellant, most of which are irregular, and could be considered only as reasons for a new trial. Neither party, however, has given special attention to the assignment of errors, both preferring to discuss the controlling facts and the law in relation thereto.

The land in controversy is situated in Lake County, in the extreme northwest corner of the state. It is described in the complaint as: "Lot number 5 in section 36, T. 38 N.; lots 8, 9 and 10 in section 1, T. 37 N., and lots 5, 6, 7 and 8 in section 12, T. 27 N., all in range 10 W., Lake County, Indiana, and containing 252.5 acres more or less."

The appellant in her cross-complaint made claim to the same land, "in plaintiff's complaint described," and asked that her title thereto be quieted as against the plaintiff and all of her co-defendants; and that they be enjoined from setting up any claim thereto.

The appellees, who are in possession of the lands in controversy, claim title under the original government survey, by virtue of patents from the United States to the State of Indiana, and from the state to their remote grantors.

Townships 38 and 37 north, range ten west, in which the lands are situated, were originally surveyed in 1834,

under authority of the United States Land Department, as shown by the field notes and plats made a part of the record. These townships are both fractional, lying next to the state line dividing Indiana from Illinois, and are in part covered by a body of water known as Wolf Lake.

The appellees claim that title to all of these lands passed from the general government to the State of Indiana by the swamp land act of September 28, 1850, subject only to identification and selection by the state and approval thereof by the Secretary of the Interior. The patent from the United States to the state is dated March 24, 1853. In this patent it is recited that "The United States of America, in consideration of the premises and in conformity with the Act of Congress aforesaid, have given and granted, and by these presents do give and grant unto the said State of Indiana, in fee simple, subject to the disposal of the legislature thereof, the tracts of land above described." The tracts so described include: "The whole of fractional sections one, twelve, * * * all in township thirty-seven north, of range ten west, * * * also the whole of fractional section thirty-six, in township thirty-eight north, of range ten west." The court found the title thus traced by appellees to be good, and held that they were entitled to continue in possession of the lands in dispute.

The appellant contends that the bed of Wolf Lake, covering a part of the above described sections as aforesaid, was not surveyed in the original survey of 1834, and shows that on representations to that effect, made to the Land Department of the United States, the commissioner of the general land office ordered a re-survey of the land within the meander lines of the lake, which re-survey was

made in 1875. Appellant then claims that on such re-survey by the Land Department the lots in the lake bed became subject to entry and sale, and subject also to the right of appellant's remote grantors to locate "Sioux half-breed scrip" thereon; and she traces her title from patents issued for said lots to such remote grantors on such location of half-breed scrip.

Appellees, on the other hand, contend that all said fractional sections, including the bed of the lake, were surveyed in 1834, and the lands and lots sold by the United States under such survey, so that, rightfully, the government had no such land to survey or sell when the order for the survey of 1875 was made and the lands in question attempted to be re-sold by the Land Department.

As the appellant must succeed, if at all, on the strength of her own title, it will be sufficient to decide the contention here made. If the lands in controversy were, in fact, surveyed in 1834, and sold by the United States under such survey, then it is clear enough that the government had no authority or power to re-survey the lands in 1875, or to sell them over again, and appellant's title must wholly fail.

The annexed plats show the original survey in 1834 of section thirty-six in township 38, and of sections one and twelve in township thirty-seven; and also the re-survey in 1875 of that part of the bed of Wolf Lake, in the same townships and sections, being all that is necessary to indicate the location of the lands in dispute:

We are of opinion that in the original survey of 1834 both townships in question and all of the sections were fully surveyed, including the bed of Wolf Lake.

The plat, with the chains marked thereon, show that

the townships were both fractional. Township 38 consists only of fractional section 36, lying between the Illinois line and Lake Michigan. Township 37 is less than a mile in width, extending from the east township line west to the state line. The field notes show that the east section line, and also the west line, being the state line, were actually run; and that the section corners on said east section line of sections one and twelve were marked. The field notes also show that the east and west line between townships 38 and 37, being the north line of section 1, T. 37, was actually run, except a short distance in the northeast corner, which extends into Lake Michigan; also that the east and west section line between sections 1 and 12, T. 37, was run; also that the east and west section line on the south side of section 12, T. 37, was run from the southeast corner of said section west to the lake, **this line not being extended in the field across to the state line, or west line of the section.** The field notes further show, as does the plat, that all the interior lines of section 36, in T. 38, and the greater part of those in sections 1 and 12, in T. 37, were actually run and the corners marked in the field.

Under provisions of sections 2395 and 2396, R. S. U. S., the foregoing was a sufficient survey of the townships and sections named. By section 2395 R. U., *supra,* it is made a sufficient survey to run "each way, parallel lines at the end of every two miles, and by taking a corner on each of such lines at the end of every mile." In the foregoing survey the east and west section lines, as actually run (are less than a mile apart. All the lines, interior and exterior, of section 36, T. 38, are actually run). So also are all the lines, interior and exterior, of section 1, T. 37. For section 12, T. 37, the north line is actually run.

There remains only the south line of said section 12, a part only of which is run. For this defect, if it should be considered such, section 2396, U. S. R. S., *supra*, provides as follows:

"The boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; **but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township."** Following this direction, the south line of section 12 will be found by "running from the established corner," at the southeast corner of said section, a "due east and west line, west to the state line, being the west external boundary of such fractional township." [This is the error complained of. W. P. F.]

It appears, therefore, that township 37, as well as township 38, was fully surveyed in the original survey of 1834; that the lines of the survey extend over both land and water, and that the United States conveyed to the state the fractional townships so surveyed.

It follows that all the territory in question in the two townships, including that covered by Wolf Lake, as well as the comparatively dry land on its borders, having passed to the state from the ownership of the United States by the Swamp Land Act of 1850, and the patents

issued to the state therefor in 1853, no land in said sections remained, whether under Wolf Lake or elsewhere, which could be re-surveyed or re-sold by the general government. The survey of 1875 and the sales thereunder were nullities. Appellant, therefore, has no title to the lands claimed by her. See *Tolleston Club* v. *State,* 141 Ind., 197, where a similar question is considered and a like decision reached.

Two objections made to this conclusion may be noticed:

First, it is said that the validity of the re-survey of 1875 having been affirmed by the United States Land Department, which department had full jurisdiction of the matter, the question is not reviewable in the courts. It is true, as said in *Hardin* v. *Jordan,* 140 U. S., 371, that the decisions of the Land Department on matters of fact within its jurisdiction, made in the course of administration, cannot be called in question collaterally.

But, as said in the same case by the Supreme Court of the United States: "If the lands patented were not at the time public property, having been previously disposed of * * * the department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void." See also *Mitchell* v. *Smale,* 140 U. S., 406.

The other objection made is, that in the Beaver Lake case, the *State* v. *Portsmouth Savings Bank,* 106 Ind., 435, this court decided that the sale of the border lots on Beaver Lake, under the original government survey, did not carry title to the lands covered by the waters of the lake. The case is not in point for the very good reason that in the Beaver Lake case the lands under the lake were

not surveyed; the survey ceased at the borders of the lake. In the case of Wolf Lake, however, as we have seen, the lake itself was included in the survey; the section lines passed over and included the waters as well as the land. Had Beaver Lake been actually surveyed, as Wolf Lake was, the matter would be different; as it is that case is not in point. The case at bar is ruled by the Tolleston Club case, *supra.*

The judgment is affirmed.

THE STATE OF INDIANA,
SUPREME COURT.

I, Alexander Hess, clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion of said court in the above entitled cause.

In witness whereof I hereto set my hand and affix the seal of said court, at the city of Indianapolis, this 29th day of January, 1896.

[SEAL.] (Signed) ALEX. HESS, *C. S. C.*

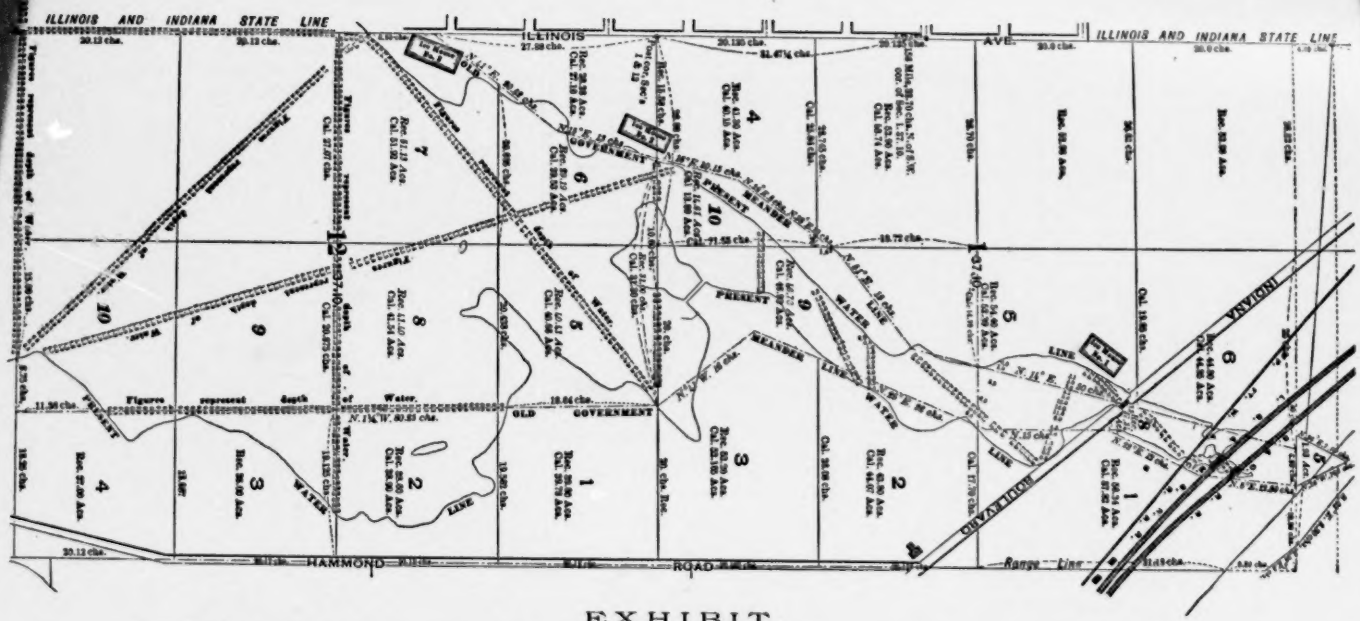


EXHIBIT.

Plat showing Survey of Sections 36, T. 38, R. 10, and Sections 1 and 12, T. 37, R. 10, in Lake County, Indiana,

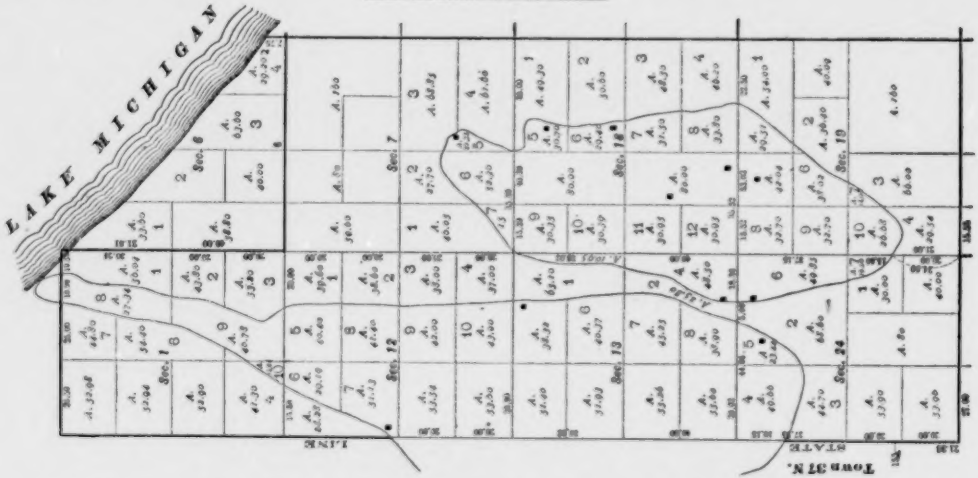
—AND INVIRONS—

BY HIRSCH & VANDERLIP, IN AUGUST AND SEPTEMBER, 1889.

See Record page.....

"TOWNSHIP No. 37 N., RANGE No. 10 W., 2nd MERIDIAN, INDIANA."

"The survey of the Lakes, comprised with in pink shaded lines, was appealed from the Commissioner's approval to the Secretary of the Interior, April 20, 1876, and the approval of the survey was affirmed by the Secretary, February 23rd, 1897." See Record page.....



"The above map of Township No. 37 North, of Range No. 10 West, of the Second Meridian, Indiana, is strictly conformable to the field notes of the survey, thereof on file in this office, which have been examined and opproved."

"J. S. BURDETT,"

"Comr. & Ex-Officio Surv. Gen'l of Indiana."

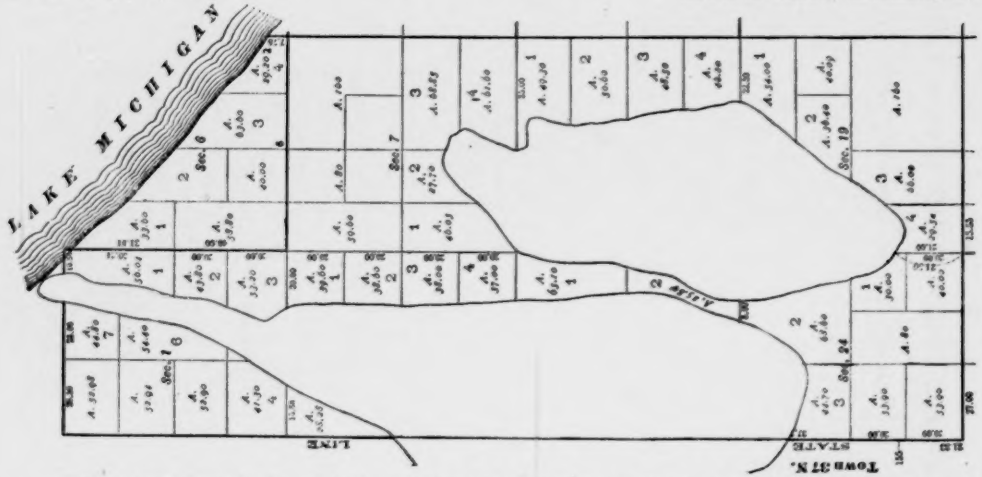
EXHIBIT.

See Record page.....

"Department of the Interior General Land Office, Washington, October 3rd, 1889."

"This plat of Township No. 39 North, of Range No. 10 West, Second Meridian, is a true copy of the official plat thereof."

"LEWIS A. GROFF, *Commissioner.*"



"The above map of Township No. 37 North, of Range No. 10 West, of the 2nd Meridian, Indiana, is strictly conformable to the field notes of the survey thereof on file in this office, which have been examined and approved."

Surveyor Generals Office, Cincinnati, O. April 26th, 1836.

ROBT. T. LYTLE, *Sur. Gen'l,*

by SAMUEL WILLIAMS, *Ch. Cl'k.*

ROBT. S. LYTLE, S. G.

...BEDS...
OF
WOLF AND GEORGE LAKES.

Surveyed by Wolcott.